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STATE WATER RESOURCES CONTROL BOARD

Communities for a)	
Better Environment,)	
)	
Petitioner,)	Petition for Review of
)	Action by a Regional Board
Regional Water Quality Control)	
Board-San Francisco Bay Region,)	
)	
Respondent)	Water Code § 13160; 13320
)	23 CCR 2050
_____)	

INTRODUCTION

Communities for a Better Environment (“CBE”) submits this petition for review of a regional board permit action that improperly allows pollutant discharges from the Equilon Enterprises / Shell Martinez oil refinery (“Refinery” or “Discharger”) pursuant to compliance schedules. The Refinery’s new permit fails to require the Discharger to comply with water quality based effluent limits, instead allowing the Discharger to continue adding pollutants in quantities that contribute to harms to the San Francisco Bay estuary thus prevent CBE’s members from using and enjoying the waters.

PETITION ALLEGATIONS

CBE, in accordance with 23 CCR 2050, alleges the following:

I. NAME AND ADDRESS OF PETITIONER

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II. SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD

CBE requests review of the action of the Regional Water Quality Control Board, San Francisco Bay Region (“Regional Board”) granting Shell’s application to renew NPDES No. CA0005789, for the Shell refinery in Martinez, California, on October 11, 2006 to the extent discussed in this Petition. Regional Board Order R2-2006-0070 granting this permit renewal (the “permit”) is appended hereto as Exhibit A.

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III. THE DATE THE REGIONAL BOARD ACTED OR REFUSED TO ACT

The Regional Board acted, by adopting Order R2-2006-0070, thereby granting the permit, on October 11, 2006.

IV. STATEMENT OF THE REASONS THE ACTION WAS IMPROPER

Rather than requiring the Refinery to comply with discharge limits that will protect the receiving waters, the permit (NPDES No. CA0005789) includes as actual limits only performance-based restrictions. The permit's extended compliance schedules will allow the Refinery to continue to discharge high levels of harmful toxins such as cyanide, mercury, selenium, PCBs and dioxins.

A. The Refinery Contributes Toxic Pollution to the Bay Area's Waterways

The Refinery produces an array of petrochemicals and their byproducts, including motor gasoline, jet turbine fuel, diesel, petroleum coke, residual fuel oil, road asphalt, lubricant products, propane, and sulfur.¹ It has an average crude throughput of approximately 148,000 barrels per day, an average facility flow of 5.8 million gallons per day, and a maximum facility flow of 9.5 million gallons per day.² Pursuant to its NPDES permit, the Refinery spews a multitude of toxins into Carquinez Strait and Peyton Slough.

Among the pollutants for which discharge data exists, the Refinery is discharging PCBs, mercury, cyanide, selenium, and dioxins into the waterways at levels that cause or contribute to violations of the Basin Plan's water quality objectives. In addition, these toxins have the potential to seriously harm the health of the Bay's wildlife, and of fishermen and hunters who hunt and eat fish and wildlife from the Bay and their families.

¹ Online Webpage for Shell Martinez Refinery: www.piersystem.com/go/site/159/, last visited 8/23/06.

² Order No. R2-2006-XXXX, NPDES No. CA0005789 for the Shell Martinez Refinery, p. 64.

Exposures of subsistence anglers and their families to mercury are dangerously high. The Refinery's mercury discharges contribute to violations of water quality standards protecting fishing and other beneficial uses of water. Mercury has been measured at elevated concentrations in sediment, fish, and other species throughout the Bay.³ This pollution threatens the health of aquatic life, wildlife, and subsistence anglers. Indeed, the State of California warns people not to consume ANY of certain types of fish from the Bay, and warns women against eating more than 8 ounces of other fish species and size classes, due to the neurotoxicity mercury can cause in developing babies. Yet individual subsistence anglers and their families eat 100-450 grams/day of Bay-caught fish.⁴ As the majority of these subsistence anglers are poor people and people of color, the Refinery's discharges contribute to serious environmental injustices.⁵

Similarly, exposures of subsistence anglers and their families to dioxins can far exceed safe exposure levels, causing violations of water quality standards protecting fishing uses and public health. The Refinery contributes to violations of water quality standards for dioxins. Dioxins threaten human health at even minimal general-population exposure levels. After a decade-long process of reassessing dioxins, EPA concluded that at current general-population exposures, dioxins increase cancer risk to unacceptable levels and appear to cause defects in

³ RWQCB, 2000. "Contaminant Levels in Fish Tissue from San Francisco Bay: Final Report." San Francisco Bay Regional Water Quality Control Board, California Department of fish and Game, and State Water Resources Control Board, 1995; and "Watershed Management of Mercury in the San Francisco Bay Estuary: Draft TMDL to USEPA. CRWQCB, SF Bay Region. May 9, 2000.

⁴ Karras, 2001: "Dioxin Pollution Prevention Inventory for the San Francisco Bay." Persistent, Bioaccumulative and Toxic Chemicals II: Assessment and New Chemicals. Lipnick, R.L., Jansson, B., Mackay, D., Petreas, M., Eds. American Chemical Society, pp. 124-137; and APEN, 1998, "A Seafood Consumption Survey of the Laotian Community of West Contra Costa County, CA. Asian Pacific Environmental Network, Oakland, CA.; and Transcript of 9/7/00 Evidentiary Hearings before the State WRCB, Evidentiary Hearings on Tosco Petitions, Harris State Bldg., Oakland, CA.

⁵ CBE, 1998: "On the Hook for Zero Dioxin." Report No. 98-2. CBE: Oakland and Huntington Park, CA. Also See FN 7.; and NEJAC, 1998: "Health and Research Committee Dioxin Resolution." Adopted by the National Environmental Justice Advisory Council, May 31-June 3, 1998, Oakland, CA.

developing children.⁶ For example, dioxins and PCBs exposures in the womb and via breast milk are associated with effects on children's learning and immune systems at the pollution levels faced by subsistence anglers of San Francisco Bay.⁷ EPA found that dioxins can cause diabetes and endometriosis. The exposure of local subsistence anglers and their families to such toxins is between ten to thirty times that of the general population. The disparate impact of the Refinery's dioxin discharges on such poor people of color clearly illustrates the environmental injustice such discharges cause.

Exposures of subsistence and recreational hunters and anglers and their families to selenium discharged in their community's waters can reach dangerous levels.⁸ The Refinery's discharges contribute to violations of water quality standards protecting beneficial uses like hunting and fishing. The State of California warns that regular consumption of certain species of ducks from the Bay may have serious negative health effects in pregnant women and their children due to selenium toxicity. Based on such evidence, selenium has been found to cause violations of water quality standards in the Bay, including portions of the Bay affected by the Refinery's discharge. This is also an environmental justice issue, as the majority of the families exposed to the selenium in these waters are poor people of color.

Likewise, the Refinery's PCBs discharges contribute to violations of water quality standards protecting beneficial uses. Exposures of subsistence anglers and their families, aquatic

⁶ EPA, 2000. "Dioxin Reassessment." Report on peer review transmitted by Dr. Glaze, Chair, Science Advisory Board, to Christine Whitman, Administrator, USEPA, 5/31/01.

⁷ Weisglas-Kuperus, 2000. "Immunologic Effects of Background Exposure to PCB's and Dioxins in Dutch Preschool Children." *Environmental Health Perspectives*, 108(12): 1203-1207. Karras, 2001: "Dioxin Pollution Prevention Inventory for the San Francisco Bay." Persistent, Bioaccumulative and Toxic Chemicals II: Assessment and New Chemicals.

⁸ Luoma, 1992: Letter from Dr. Luoma, USGS, to Steven Ritchie, Exec. Officer, CRWQCB, SF Bay Region, 8/24/92; and Luoma and Linville: "A Comparison of Selenium and Mercury Concentrations in Transplanted and Resident Bivalves from North SF Bay," *Regional Monitoring Program 1995 Annual Report*, SF Estuary Institute, Richmond, CA; and Schlekat et al.: "Bioavailability of Particle-associated SE to the Bivalve *Potamocorbula amurensis*. *Environmental Science and Technology*, 34(21): 4504-4510.

life, and wildlife to non-dioxin-like PCBs can reach levels that are extremely harmful.

Measurements demonstrate that PCBs contaminate water, sediment and the food chain throughout the Bay.⁹ Harbor seals (a protected marine mammal species) sampled in the Bay have extremely elevated concentrations of these highly toxic chemicals in their blubber.¹⁰ This evidence indicates that PCBs levels in and around the Bay are dangerously high. The State of California warns that eating more than 8-16 ounces per month of bay fish contaminated with these carcinogenic, hormone-disrupting and neurotoxic substances could threaten the health of people who fish for food in the Bay. Yet individual subsistence anglers eat substantially more than this amount (107-480 ounces per month). As noted above, dioxins and PCBs exposures in the womb and via breast milk are associated with effects on children's learning and immune systems at the pollution levels faced by subsistence anglers of San Francisco Bay.¹¹ For these reasons, the Refinery's PCBs discharges contribute to environmental injustice.

In response to the Refinery's contributions to gross exceedances of limits that would protect water quality standards, the Regional Board adopted interim limits based on the levels of pollution that the Refinery currently spews into the Carquinez Strait and Peyton Slough. Staff proposes that the Refinery be permitted to continue to discharge these high levels of toxins into our environment until 2010 for PCBs, mercury, cyanide, and selenium, and until 2011 for dioxins.¹² In other words, rather than expecting the Refinery to change its behavior to meet the requirements of the Basin Plan and the Clean Water Act, the Tentative Order would have this Board deeply compromise those requirements to meet the discharging desires of the facility. As described further below, such a procedure flies in the face of the foundational purposes of the

⁹ See *id.* and ftnt 7.

¹⁰ See *id.*

¹¹ See ftnt 7.

¹² Order No. R2-2006-XXXX, NPDES No. CA0005789 for the Shell Martinez Refinery, pp. 97, 98.

Clean Water Act. By permitting the Refinery to operate at a discharge level that is comfortable for the Discharger to maintain, rather than acting to protect the health of the people who fish, swim, and recreate in the receiving waters of the Refinery, the permit defies the spirit and the letter of the Clean Water Act.

B. Under the CWA, Dischargers Must Comply with Water Quality Based Effluent Limits Immediately

The Clean Water Act was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to achieve water quality that “provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water.”¹³ States that receive EPA approval to do so may issue CWA pollutant discharge permits pursuant to NPDES.¹⁴ NPDES permits must contain all water quality-based effluent limits (“WQBELs”) that are “necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to [the CWA].”¹⁵

Congress mandated that WQBELs in NPDES permits be set at a level necessary to attain water quality standards regardless of economic and technological restraints. Even a lack of currently available pollution control technology was not to slow attainment of the CWA’s goal of clean water. Indeed, Congress foresaw that implementing the CWA’s sweeping policies would impose economic hardship, including the closing of some plants, and accepted that some economic disruption would be needed to ensure clean water.

¹³ 33 U.S.C. §§ 1251(a), (a)(2).

¹⁴ 33 U.S.C. § 1342.

¹⁵ 33 U.S.C. § 1311(b)(1)(C).

Congress intended the CWA to be "technology-forcing," to bring about the development and implementation of new treatment and other pollution discharge reduction methods necessary to attain clean water. Congress further mandated a strict deadline, long since passed, for achieving WQBELs designed to assure attainment with WQS: July 1, 1977.¹⁶ Congress provided no blanket authority in the CWA for extensions of the July 1, 1977 deadline, but it did provide authority for the states to shorten the deadline. 33 U.S.C. section 1313(f) provides that:

[n]othing in this section [1313] shall be construed to affect any effluent limitations or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

Given that the statute contains explicit authority to expedite the compliance deadline but not to extend it, neither the EPA nor the States may authorize extensions beyond this deadline in NPDES permits.

The 1977 deadline applies even when the relevant WQS are established after that date. 33 U.S.C. section 1311(b)(1)(C) requires the achievement of "more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter." Congress required states to continue updating water quality standards after 1977 statutory deadline,¹⁷ but after that date, made no allowance for compliance schedules.¹⁸ Congress therefore presumed that dischargers would come into immediate compliance with newly adopted water quality standards after 1977. A compliance schedule that extends the duty

¹⁶ 33 U.S.C. § 1311(b)(1)(C).

¹⁷ 33 U.S.C. § 1313(c).

¹⁸ Congress has authorized limited extensions of the 33 U.S.C. section 1311(b)(1)(C) deadline for "publicly-owned treatment works" ("POTWs"), precluding exceptions for other purposes, such as those presently proposed by the Board. 33 U.S.C. § 1311(i)(1).

to comply with WQBELs beyond the July 1, 1977 statutory deadline would amount to a less stringent effluent limit than required by the CWA. States are explicitly prohibited from establishing or enforcing effluent limitations less stringent than are required by the CWA.¹⁹

C. Neither the SIP nor the CTR Provides a Legal Basis for Compliance Schedules

EPA has approved California's NPDES program and has authorized the Regional Boards, pursuant to 33 U.S.C. § 1342, to issue NPDES permits to discharge pollution. EPA has also established certain water quality standards, embodied in its California Toxics Rule ("CTR"), for California's inland waters. CTR gave Regional Boards the authority to issue compliance schedules until May 18, 2005. 40 C.F.R. § 131.38(e)(3).

By contrast to CTR, EPA disapproved authority to issue compliance schedules based on certain portions of the State Implementation Plan ("SIP"). The SIP established an implementation program for certain pollutants in the CTR. The State Board submitted the SIP to EPA for approval, but while EPA approved some of these SIP provisions, but it disapproved those portions that gave power to issue compliance schedules for impaired waterways ("the Disapproved SIP Provisions").

The Disapproved SIP Provisions authorized the issuance of compliance schedules that delayed the effective date of CTR-based WQBELs for up to 15 years from the effective date of the SIP to develop and adopt Total Maximum Daily Loads ("TMDLs") and accompanying Waste Load Allocations and Load Allocations pursuant to 33 U.S.C. § 1313(d). The Disapproved SIP Provisions, however, did add an outside deadline of twenty years for the delay of WQBELs. In disapproving the Disapproved SIP Provisions, EPA clearly signaled its

¹⁹ 33 U.S.C. §1342(b); California Water Code §§ 13372, 13377.

understanding that the CWA does not allow permits to delay WQBELs on the premise that a regulator is in the process of preparing a TMDL. Instead, it reiterated that compliance schedules must be actions undertaken by a discharger, not a regulator. (A true and correct copy of EPA's disapproval letter is attached hereto as Exhibit B.)

The portions of the SIP that EPA did expressly approve generally authorize the issuance of compliance schedules for up to five years from the date of permit issuance, reissuance, or modification to complete actions necessary to comply with the WQBELs, or ten years from the effective date of the SIP - whichever is sooner. This approval contradicts the CTR's 2005 sunset date. EPA has not acted to stay or amend 40 C.F.R. section 131.38(e)(8) by the only means it can lawfully do so: notice and comment rulemaking. Without such a rulemaking, 40 C.F.R. section 131.38(e)(8) remains the law and it unequivocally ended authorization to issue compliance schedules delaying the effective date of CTR-based WQBELs after May 18, 2005.

D. The Permit's Compliance Schedules Violate the Letter and Spirit of the CWA and Strip the Public of its Right to Participate in the Preservation of Our Waterways

The State Board should overturn the Regional Board's inclusion of compliance schedules in the Refinery's permit because the schedules violate the CWA, because the Regional Board never conducted a feasibility analysis to support inclusion of the schedules, and because the schedules contravene the state's environmental justice policy. First, the Refinery's compliance schedules are offered after the CWA's 1977 deadline. Congress specifically provided that NPDES permits may contain compliance schedules until 1977 for dischargers like the Refinery. As discussed above, it also foresaw that compliance with WQBELs could cause hardship on industry, but decided that the CWA's technology-forcing scheme would only work if facilities like the Refinery were under a mandate to improve or reduce operations. Offering performance-

based limits now, more than 25 years after Congress required their termination, simply ignores the plain language of the Act.

Congress did offer a backstop procedure for cases where curtailing pollution would require closing of a facility that would result in “substantial and widespread economic and social impact.” There, the State has some discretion to relax NPDES permit limits if justified by a rigorous “Use Attainability Analysis,” a “structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors.”²⁰ The Board has not undertaken a Use Attainability Analysis, which would require public notice, comment, and hearing opportunity.²¹ Instead, the compliance schedules forego the Use Attainability Analysis process, and instead simply conform to discharge levels that are convenient for the Refinery. In its responses to comments, the Regional Board staff contends that Use Attainability Analysis is not appropriate for an individual permit, but must be conducted instead for a waterway as a whole. This interpretation fails to acknowledge that Congress has provided the Regional Board with an “out” for situations in which there is a genuine need to delay compliance with WQBELs.

However, Regional Board staff does not dispute the requirement that before issuing a compliance schedule, the Board must find that a discharger’s compliance is not feasible. Yet the Refinery’s permit fails completely to analyze the feasibility of compliance with WQBELs during the permit term. The only evidence in the record regarding feasibility is historic performance: if Shell discharges above the limit now, the permit simply *assumes* that it will be infeasible to comply at any time in the permit’s term. The permit and record provide no analysis of whether

²⁰ 40 C.F.R. §§ 131.3(g), 131.10(g).

²¹ 40 C.F.R. § 131.10(e).

Shell could comply within a few months, one year, two years, or three years. The permit admits that compliance schedules must be as short as practicable, yet there is no data in the permit or the record demonstrating it is *technically* or *economically* infeasible for Shell to meet the WQBELs before the permit expires. Such data is needed if “feasibility” is to have any meaning at all.

Third, the permit and the Regional Board staff’s responses to comments are basically non-responsive to the environmental justice impacts of Shell’s compliance schedules. Staff contends that Shell’s contributions are relatively small, and therefore EJ concerns really will only be addressed by addressing the other sources. This response ignores this agency’s responsibilities to address environmental injustice.

Cal/EPA’s environmental justice policy mandates that state agencies consider the cumulative impacts of their actions. Even small contributions of bioaccumulative toxins add to cumulative impacts. The Refinery’s permit admits that Shell’s discharges have a reasonable potential to contribute to violations of water quality standards for these pollutants. As discussed above, violations of water quality standards for these particularly pollutants disproportionately impact low-income people of color who fish the Bay for subsistence. Shell’s discharges contribute to the cumulative impact.

Further, Cal/EPA’s policy requires that agencies consider precautionary measures to avoid inflicting or exacerbating environmental injustice. Relying on future TMDLs to address current discharges is the opposite of precautionary – by delaying Shell’s compliance with WQBELs, the permit errs on the side of pollution, not environmental justice.

Finally, the effect of the Refinery’s compliance schedules would be to immunize dischargers from judicial enforcement actions that would protect the waterways, and thus prevents agencies and citizens from having the tool of securing court enforceable orders

directing dischargers to come into compliance with WQBELs. EPA and citizens thus lose the oversight tool and stakeholder status that Congress intended for them to have, leaving the Regional Boards with the sole authority to dictate the steps that must be taken to comply with WQBELs. Further, by failing to set enforceable, final numeric WQBELs in permits, if the Board uphold the Refinery's permit, it would take away from the public and from itself the power to enforce such goals as envisioned by the CWA. After all, without a fixed numeric goal to hold against polluting facilities as a limitation on their discharges, facilities such as the Refinery will be relieved of the technology-forcing and health-based mandates of the Clean Water Act. This approach clearly ignores the purposes and procedures of the Clean Water Act, and "Congress' clear intention . . . that citizen plaintiffs are not to be treated as 'nuisances or troublemakers' but rather as 'welcomed participants in the vindication of environmental interests.'"²²

E. Conclusion

The Clean Water Act was created to preserve and promote a clean environment for the use and enjoyment of all people. The disparate impact of environmental degradation and pollution on communities of color and on peoples of lower socio-economic status inflicts severe environmental injustice upon these communities. The laws and procedures of the State of California must address such injustice.

The Regional Board should reject the inefficiencies and unjust procedures that undermine the very goals of the Clean Water Act. We urge this Board to overturn the Refinery's permit and

²² *Proffitt v. Municipal Auth. of the Borough of Morrisville*, 716 F. Supp. 837, 844 (E.D. Pa. 1989) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); see also *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d at 1525 (9th Cir. underscoring that citizen suits perform important public function); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136 (11th Cir. 1990) ("citizen suits are an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring to its own enforcement actions."); *Save Our Bays & Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1125 (D. Ha. 1994).

refuse the Refinery the right to further contribute to our waterways' loads of dangerous toxins like cyanide, mercury, selenium, PCBs, and dioxins.

V. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED

CBE has 20,000 members throughout the state of California, many of whom reside in the San Francisco Bay area. CBE's members are especially concerned with toxic discharges from refineries in the North Bay, including the Refinery. The Refinery discharges into Carquinez Strait and Peyton Slough, which flow to San Francisco Bay and are part of the San Francisco Bay estuary. Pollution discharged into the Strait and the Slough thus pose a direct health risk not only to North Bay communities, but to communities around the Bay, and people in those communities who fish for subsistence and recreation, swim and otherwise recreate in these waters.

VI. THE SPECIFIC ACTION THE PETITIONER REQUESTS

For the reasons set forth herein petitioners respectfully ask that the State Board, after reviewing this matter:

1. Order the Regional Board to rescind the compliance schedules and interim limits in the Refinery's permit;
2. Order the Regional Board to insert WQBELs in the Refinery's permit, to take effect immediately.

VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

Points and authorities in support of legal issues raised in the petition are stated in section IV above.

VIII. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND THE DISCHARGER, IF NOT THE PETITIONER.

Copies of this petition have been sent to the Regional Board and the discharger, Shell / Equilon. See attached proof of service by mail.

IX. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD.

The substantive issues and objections raised in this petition were raised before the Regional Board in timely written comments and at the Regional Board's hearing for adoption of the permit, on October 11, 2006, to the extent possible within a 3 minute time limit on oral public hearing comments.

CONCLUSION

For the foregoing reasons, CBE respectfully submits that the Regional Board's action in issuing a permit with compliance schedules to the Refinery, as discussed in this Petition, was improper, inappropriate, unlawful, and not supported by substantial evidence.

Dated November 10, 2006

Respectfully Submitted,

Shana Lazerow, Attorney for Petitioner CBE

Attachments: Proof of service
Exhibit A. Regional Board Order R2-2006-0032
Exhibit B. EPA SIP Disapproval Letter